

Third Division
September 30, 2013

No. 1-12-2791

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PAUL HESTER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	09 M31937
)	09 M33247
NORTH BARRINGTON PROFESSIONAL CENTER)	
CONDOMINIUM ASSOCIATION,)	Honorable
)	Sandra Tristano,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* A court does not acquire personal jurisdiction over a corporation when a summons is served on a person who is not a corporate officer, the corporation's registered agent, or an agent designated to accept service on behalf of the corporation.
- ¶ 2 The plaintiff, Paul Hester (Hester), filed a complaint against the defendant, North Barrington Professional Center Condominium Association (North Barrington 2), and alleged that North Barrington 2 breached its contracts when it failed to make the required payments to Hester. When

North Barrington 2 failed to file an appearance or an answer, the trial court entered a judgment in favor of Hester and against North Barrington 2. Ten months later, North Barrington 2 filed a petition to vacate the judgment, but the trial court denied the motion. North Barrington 2 appeals and contends that the judgment is void because the trial court did not acquire personal jurisdiction over the corporation.

¶ 3 We find that North Barrington 2 was not served with process, as prescribed by section 2-204 of the Code of Civil Procedure (Code) (735 ILCS 5/2-204 (West 2010)), when the sheriff left a copy of a summons with a person who was not an officer, the corporation's registered agent, or an agent designated to receive process on behalf of North Barrington 2. Therefore, we find that the trial court did not have personal jurisdiction over North Barrington 2, and hold that the trial court's judgment against North Barrington 2 was void. Accordingly, we reverse the trial court's judgment and remand to the trial court for further proceedings.

¶ 4 Background

¶ 5 We note that there are several similar-named corporations that are involved in the instant case. First, NB Professional Center, Inc., an Illinois corporation, was incorporated on August 27, 2003. Gregory Schmitt was its president and Thomas A. O'Donnell Jr. became the registered agent on July 13, 2006. NB Professional Center, Inc. was involuntarily dissolved on January 8, 2010.

¶ 6 Second, North Barrington Professional Center Condominium Association (North Barrington 1), was incorporated on June 7, 2004, with Gregory C. Schmitt as its president and Ira D. Leavitt as its registered agent. North Barrington 1 was involuntarily dissolved on November 1, 2006.

¶ 7 Third, North Barrington 2, was incorporated on December 29, 2004, with Ira D. Leavitt as

its registered agent and Gregory C. Schmitt as one of its directors. The 2009 annual report for North Barrington 2 names Gregory C. Schmitt as its president and registered agent and lists the registered agent's address as 1845 East Rand Road, Suite 103, Arlington Heights. The 2010 Secretary of State's Corporation File Detail Report for North Barrington 2 names Jack Kristof as president of the corporation.

¶ 8 On January 3, 2006, Sentry Security Incorporated (Sentry Security) entered into four written contracts with “N.B. Professional Ctr. Asso.” to provide and install alarm systems at the Wynstone office complex, buildings 2, 3,4 and 5 at 400 North Rand Road, North Barrington. Gregory Schmitt signed the contracts as manager for “N.B. Professional Ctr. Asso.” When N.B. Professional Center Association failed to make the payments under the contracts, Hester filed case number 09 M3 1937 on June 4, 2009, naming “Gregory C. Schmitt d/b/a/ N.B. Professional Condo. Assoc.” as the defendant and seeking \$41,685 in damages. The complaint alleged that Hester was the owner of Sentry Security and that all rights under the contracts between Sentry Security and Gregory Schmitt were assigned to Hester.

¶ 9 On September 29, 2009, Hester filed a second case, number 09 M3 3247, naming Talon Development of Illinois, Inc. and Talon Development, Inc. as the defendants. The complaint alleged that Sentry Security entered into a contract with Talon Development of Illinois, Inc. and Talon Development, Inc. in October of 2004 to install alarm systems for the corporations and that the corporations refused to tender the payments. Hester alleged that he was owed \$41,685.

¶ 10 On October 23, 2009, Hester filed a motion to consolidate Hester v. Schmitt d/b/a/ N.B. Professional Condominium Association (No. 09 M3 1937) with Hester v. Talon Development of

Illinois, Inc. and Talon Development, Inc. (No. 09 M3 3247). In the motion, Hester alleged that the causes of action in the two complaints arose from the same transaction.

¶ 11 On November 4, 2009, Hester filed a motion for a default judgment in case No. 09 M3 1937 against Gregory Schmitt for failure to file an appearance or an answer. On November 12, 2009, the trial court granted Hester's motion to consolidate the two cases, and his motion for a default judgment against Gregory Schmitt. On December 4, 2009, Gregory Schmitt filed an appearance and a section 2-1301 motion to vacate the default judgment, and the trial court granted the motion on December 10, 2009.

¶ 12 On January 11, 2010, Gregory Schmitt filed a section 2-615 (735 ILCS 5/2-615 (West 2010)), motion to dismiss the complaint and argued that he was not liable for the unpaid balance on the contracts because he was not a party to the contracts and he signed each contract as manager for the condominium association. In his section 2-615 motion, Gregory Schmitt also argued that "N.B. Professional CTR. Assoc." was "an obvious abbreviation for North Barrington Professional Center Condominium Association, *** incorporated *** on December 29, 2004." Hester was granted leave to file an amended complaint to add North Barrington 2 as an additional defendant.

¶ 13 On January 12, 2010, the day after Gregory Schmitt filed his motion to dismiss, he resigned from his positions as director and officer of North Barrington 2, which became effective on January 13, 2010.

¶ 14 On March 8, 2010, the court granted Gregory Schmitt's motion to dismiss without prejudice. On March 15, 2010, Hester filed an amended complaint in case No. 09 M3 1937, and he named North Barrington 2 as the sole defendant.

¶ 15 Following the filing of the amended complaint, the Clerk of the Circuit Court of Cook County issued an alias summons against North Barrington 2. The summons directed the sheriff to serve the named defendant "c/o Gregory C. Schmitt, Registered Agent, 1845 E. Rand Road, Arlington Heights, Il 60004." A deputy sheriff filed a return of service on April 16, 2010, which stated that he left a copy of a summons with Betsy McAvoy, an "Authorized Person" on April 12, 2010, at 4:35 p.m.

¶ 16 On April 22, 2010, the court entered an order setting the matter for trial on August 12, 2010.

¶ 17 On May 10, 2010, Gregory Schmitt filed a "Notice of Resignation of Registered Agent" with the Secretary of State, and he resigned from his position as the registered agent for North Barrington 2. Gregory Schmitt's resignation became effective on June 10, 2010.

¶ 18 On the August 12, 2010, trial date, the court entered a memorandum of judgment against North Barrington 2 and a memorandum of judgment against Talon Development of Illinois, Inc. and Talon Development, Inc., each for \$41,685 plus costs.

¶ 19 On March 31, 2011, Hester filed a citation to discover assets. Jack Kristof, the president of North Barrington 2, was served with a copy of the citation on April 8, 2011.

¶ 20 On June 28, 2011, North Barrington 2 filed a petition to vacate the default judgment entered on August 12, 2010.

¶ 21 On July 26, 2011, the trial court granted North Barrington 2 leave to file an amended motion to vacate on August 2, 2011. North Barrington 2's amended petition contained three motions: (1) a motion to quash service, alleging that North Barrington 2 was never served with a copy of a summons and that the person who received the summons had no relationship to North Barrington

2; (2) a section 2-1301 motion, alleging that the August 12, 2010, order was not final because it was vague; and (3) a section 2-1401 motion, alleging that North Barrington 2 was not the proper defendant and that it was not properly served with process. North Barrington 2 supported its petition with the affidavit of Jack Kristof. Kristof averred in his affidavit that he was the president of North Barrington 2, and that the defendant never received proper notice or service.

¶ 22 On August 23, 2011, Hester filed a response to North Barrington 2's motion to vacate judgment and quash service. In his response, Hester first addressed North Barrington 2's motion to quash service and argued that North Barrington 2 was properly served when the sheriff left a summons with McAvoy at the office of the corporation's registered agent and that McAvoy appeared to be an intelligent and competent employee. Next, Hester responded to North Barrington 2's section 2-1301 motion and argued that North Barrington 2 could not seek relief under section 2-1301 because the August 12, 2010, order was final and North Barrington 2's motion to vacate was filed more than 30 days after the order was entered. Finally, in response to North Barrington 2's section 2-1401 petition, Hester argued that he was not served in compliance with Supreme Court Rules 105 and 106 because his attorney was the only one served with a copy of North Barrington 2's motion to vacate.

¶ 23 Hester filed a supporting affidavit with his response and averred that during 2004 and 2006 he made numerous visits to Gregory Schmitt's office, that he often left legal documents, contracts, lien waivers and bid proposals with McAvoy and Pam, Gregory Schmitt's assistants, and that Gregory Schmitt responded promptly to the documents left for him. According to Hester, both assistants appeared to be intelligent, competent and able to communicate effectively.

¶ 24 On April 4, 2012, McAvoy was deposed and testified that she has been an employee of RJ Schmitt and Associates (RJ Schmitt) for approximately four and a half years, that RJ Schmitt is an appraisal company, and that Ray Schmitt, its president, is Gregory Schmitt's brother. McAvoy's duties at RJ Schmitt were answering the telephone, entering orders in the computer for property appraisals, and general receptionist duties. McAvoy explained that she "worked just for RJ Schmitt and I was told that Greg's company — he does his own stuff. I never touched any of his stuff. The only thing I would do is put mail on his desk that would come in." She testified that she does not know Hester, does not know of any procedure in place for accepting service of process, and does not recall receiving a copy of a summons and complaint on April 12, 2010.

¶ 25 On August 21, 2012, the trial court held a hearing on North Barrington 2's motion to quash service and to vacate the judgment and found that North Barrington 2 was properly served when the sheriff left a copy of the summons with McAvoy. The court denied North Barrington 2's motion to quash service and to vacate the judgment. Finally, North Barrington 2 is the only party that filed a notice of appeal in this case.

¶ 26 Analysis

¶ 27 Initially, we note that North Barrington 2's motion to quash service did not specifically invoke any section of the Code. Section 2-1401 petitions allow parties to undo or avoid final judgments more than 30 days after the judgment is entered. 735 ILCS 5/2-1401 (West 2010). Motions to quash for lack of jurisdiction brought more than 30 days after final judgment seek similar relief. *OneWest Bank FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 12. In *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002), our supreme court held that a pleading that

challenges a void judgment based on invalid service must be brought under section 2-1401. Therefore, because North Barrington 2's motion to quash service of process sought relief from a final judgment more than 30 days after the judgment was entered, we will treat North Barrington 2's motion to quash as a section 2-1401 petition. We review an order denying a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 28 Before we address North Barrington 2's contention that it was not properly served, we must first address Hester's contention that this court does not have jurisdiction over North Barrington 2's appeal because North Barrington 2 did not give him notice of the section 2-1401 petition in accordance with the Supreme Court Rules. See Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); R. 106 (eff. Aug. 1, 1985).

¶ 29 Section 2-301 of the Code governs challenges to personal jurisdiction and provides, in pertinent part, as follows:

"(a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, *** by filing a motion to dismiss the entire proceeding or *** by filing a motion to quash service of process.

(a-5) If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301 (West 2010).

Thus, pursuant to section 2-301, a party waives its objection to jurisdiction if the party does not object to the court's jurisdiction before filing a responsive pleading. *Cardenas Marketing Network, Inc. v. Pabon*, 2012 IL App (1st) 111645, ¶ 24; *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593, 596-97 (2006); 735 ILCS 5/2-301 (West 2010).

¶ 30 Here, Hester did not object to the court's jurisdiction over him until after he filed his response to North Barrington 2's motion to quash service and his response to North Barrington 2's section 2-1301 petition. Therefore, we find that Hester waived his objection to the trial court's jurisdiction because he did not object to the court's jurisdiction before he filed his responses. *Cardenas Marketing Network, Inc.*, 2012 IL App (1st) 111645, ¶ 24; *KSAC Corp.*, 364 Ill. App. 3d at 596-97.

¶ 31 Next, we address North Barrington 2's argument that the trial court lacked jurisdiction to enter the judgment against it because it was not properly served with process. We note that in order for a judgment to be valid, the court must have both jurisdiction over the subject matter of the litigation and personal jurisdiction over the parties. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). "Absent a general appearance, personal jurisdiction can be acquired only by service of process in the manner directed by statute." *Thill*, 113 Ill. 2d at 308. The Code authorizes service of process either by summons (735 ILCS 5/2-203, 2-204, 2-205 (West 2010)), or in certain actions by publication and mailing (735 ILCS 5/2-206) (West 2010)). *Thill*, 113 Ill. 2d at 308.

¶ 32 Section 2-204 of the Code provides, in pertinent part, that a private corporation may be served:

"(1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner

now or hereafter permitted by law." 735 ILCS 5/2-204 (West 2010).

¶ 33 Generally, the sheriff's return is *prima facie* evidence of service, and it can only be set aside by clear and satisfactory evidence. *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). Case law makes it clear that the recital in the sheriff's return that service was made upon a person who was an agent of the corporate defendant is not conclusive because the status of agency is a legal conclusion based on facts which are typically not within the personal knowledge of the officer and can be placed in issue by the affidavit of the defendant. *Nibco*, 98 Ill. 2d at 172; see also *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 723-24 (1980). For service of process on a corporation to be effectively made upon an agent of defendant, such agent must have actual authority to accept service on behalf of the corporation. *Dei v. Tumara Food Mart, Inc.*, 406 Ill. App. 3d 856, 862 (2010).

¶ 34 In this case, the sheriff's return of service states that service was made on McAvoy, "an authorized person." Kristof placed the court's jurisdiction in issue by averring in his affidavit that North Barrington 2 never received proper notice or service.

¶ 35 In *Knapp v. Bulun*, 392 Ill. App. 3d 1018 (2009), the court considered whether a secretary to the corporation's registered agent was an agent of the corporation for service of process. *Knapp*, 392 Ill. App. 3d at 1020. A summons for discovery was served on a paralegal and secretary to the registered agent of the corporation. *Knapp*, 392 Ill. App. 3d at 1020. The *Knapp* court held that service on the paralegal and secretary did not constitute proper service on the corporation because the paralegal was not designated as an agent to receive process. *Knapp*, 392 Ill. App. 3d at 1030; see *Slates*, 90 Ill. App. 3d at 725 (holding that service on the employee of an agent is inadequate in

Illinois, where the employee has not been designated as an agent to receive process); *Mason v. Freeman National Printing Equipment Co. Ltd.*, 51 Ill. App. 3d 581, 583-84 (1977) (recognizing that "[n]owhere does the statute provide that service can be had on an employee of the registered agent"); see also *Dei*, 406 Ill. App. 3d at 866 (holding that service of process on an employee who was neither a registered agent nor an officer of the corporation was not proper service on the corporation).

¶ 36 We find that the Secretary of State's corporate records for North Barrington 2 establish that McAvoy was not an officer or registered agent of North Barrington 2. We also find that McAvoy was not designated as North Barrington 2's agent because she testified at her discovery deposition that she works only for RJ Schmitt and that she does not work for North Barrington 2 or for Gregory Schmitt. Therefore, we hold, following *Knapp*, *Dei*, *Slates* and *Mason*, that the trial court did not acquire personal jurisdiction over North Barrington 2 when the sheriff served a summons on McAvoy because McAvoy was not an officer, the registered agent, or an agent designated to accept service on behalf of North Barrington 2. See *Knapp*, 392 Ill. App. 3d at 1030; *Dei*, 406 Ill. App. 3d at 866; *Slates*, 90 Ill. App. 3d at 725; *Mason*, 51 Ill. App. 3d at 583-84. Accordingly, the trial court erred when it denied North Barrington 2's motion to quash service of the summons and vacate the judgment.

¶ 37 Finally, Hester urges us to follow *Megan v. L.B. Foster Co.*, 1 Ill. App. 3d 1036 (1971), and to ignore *Knapp*. In *Megan*, the plaintiff filed a complaint and process was served upon a receptionist at defendant's company. *Megan*, 1 Ill. App. 3d at 1037-38. When the corporation failed to appear, a default judgment was entered against it. The corporation filed a motion to vacate the default judgment and the trial court denied the motion. On appeal, the *Megan* court held that

"service upon an intelligent clerk of a company who acts as a receptionist and who understood the purport of the service of summons was sufficient" to comply with section 13.3 that prescribes the procedure for serving a summons on a corporation (Ill. Rev. Stat. 1969, ch. 110, ¶ 13.3) (now 735 ILCS 5/2-204 (West 2010)); *Megan*, 1 Ill. App. 3d at 1038. In our opinion, *Megan* is inapposite and does not apply because the receptionist in *Megan* was an employee of the corporation, but McAvoy was not an employee or agent designated to receive process on behalf of North Barrington 2. Therefore, we decline Hester's invitation to follow *Megan*.

¶ 38 Conclusion

¶ 39 We find that the trial court did not acquire jurisdiction over North Barrington 2 because North Barrington 2 was not served in compliance with section 2-204 of the Code when the sheriff left the summons with McAvoy who was not an officer, the registered agent or an agent designated to receive service of process on behalf of North Barrington 2. Therefore, the trial court erred when it denied North Barrington 2's petition to vacate the August 12, 2010, judgment. Accordingly, we reverse the trial court's order denying North Barrington 2's petition to quash service and vacate the judgment and we remand to the trial court for further proceedings.

¶ 40 Reversed and remanded.